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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RYAN EDMUNDSON, On Behalf of
Himself, All Others Similarly Situated and
the General Public,

Plaintiff,

v.

THE PROCTER & GAMBLE
COMPANY,

Defendant.

Case No.: 3:10-CV-02256-IEG(NLS)

CLASS ACTION

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

Date: April 1, 2011
Time: 10:30 a.m.

Judge: Honorable Irma E. Gonzalez
Courtroom: 1, Fourth Floor
Date Filed: November 2, 2010
Trial Date: None Set

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Defendant's Motion to Dismiss	2
III. Statement of the Case.....	6
A. P&G's Deceptive Message	6
B. P&G's Back of Packaging "PowerGlide" Statement Adds to the Deceptive Message.....	8
IV. Plaintiff's Economic Injury Provides Standing	9
A. UCL and CLRA Standing	9
1. Plaintiff Lost Money	9
2. Plaintiff Adequately Pleads Reliance.....	11
B. Standing for Injunctive Relief.....	12
V. Rule 9 Does Not Apply But Is Satisfied Nonetheless.....	13
A. Rule 9 Does Not Apply	13
B. Regardless, Plaintiff's Allegations Meet Rule 9(b)'s Particularity Requirement	14
VI. Plaintiff States a Claim Under the CLRA	15
VII. Plaintiff States a Claim for Violation of Each Prong of the UCL.....	20
A. Unlawful Business Practices	20
B. Fraudulent Business Practice	21
C. Unfair Business Practices.....	22
VIII. Plaintiff States a Claim for Breach of Express Warranty	23
IX. Conclusion	25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Aron v. U-Haul Co. of California</i> , 143 Cal. App. 4th 796 (2006).....	10
<i>Autodesk, Inc. v. Dassault Systemes Solidworks Corp.</i> , 685 F. Supp. 2d 1001 (N.D. Cal. 2009)	17
<i>Baba v. Hewlett-Packard Co.</i> , No. C 09-05946, 2010 U.S. Dist. LEXIS 59747 (N.D. Cal. June 16, 2010)	19-20
<i>Barbara's Sales, Inc. v. Intel Corp.</i> , 227 Ill. 2d 45 (2007)	19
<i>Bardin v. DaimlerChrysler Corp.</i> , 136 Cal. App. 4th 1255 (2006).....	19
<i>Bly-Magee v. California</i> , 236 F.3d 1014 (9th Cir. 2001).....	14
<i>Brownfield v. Bayer Corp.</i> , No. 2:09-cv-00444-JAM-GGH, 2009 U.S. Dist. LEXIS 63057 (E.D. Cal. July 2, 2009)	12
<i>Cardinal Industries, Inc. v. Pressman Toy Corp.</i> , No. 96-4590, 1996 U.S. Dist. LEXIS 18714 (S.D.N.Y. Dec. 16, 1996).....	18
<i>Castrol, Inc. v. Pennzoil Co.</i> , 987 F.2d 939 (3d Cir. 1993).....	17
<i>Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.</i> , 20 Cal. 4th 163 (1999)	20, 23
<i>Chacanaca v. Quaker Oats Co.</i> , No. 10-0502, 2010 U.S. Dist. LEXIS 111981 (N.D. Cal. Oct. 14, 2010)	15, 17
<i>Chiron Corp. v. Genentech, Inc.</i> , 268 F. Supp. 2d 1148 (E.D. Cal. 2002).....	4, 8, 9
<i>Clorox Co. P.R. v. P&G</i> , 228 F.3d 24 (1st Cir. 2000)	17

1	<i>Committee on Children's Television, Inc. v. General Foods Corp.</i> ,	
2	35 Cal. 3d 197 (1983)	18
3	<i>Consumer Advocates v. Echostar Satellite Corp.</i> ,	
4	113 Cal. App. 4th 1351 (2003).....	15
5	<i>Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy</i> ,	
6	4 Cal. App. 4th 963 (1992).....	20
7	<i>Cooper v. Pickett</i> ,	
8	137 F.3d 616 (9th Cir. 1997).....	14
9	<i>Cortez v. Purolator Air Filtration Prods. Co.</i> ,	
10	23 Cal. 4th 163 (2000)	20
11	<i>Daugherty v. American Honda Motor Corp., Inc.</i> ,	
12	114 Cal. App. 4th 824 (2006).....	19
13	<i>Day v. AT&T Corp.</i> ,	
14	63 Cal. App. 4th 325 (1998).....	13, 16
15	<i>Deitz v. Comcast Corp.</i> ,	
16	No. C 06-06352 WHA, 2006 U.S. Dist. LEXIS 94333	
17	(N.D. Cal. Dec. 21, 2006)	13
18	<i>Dyson, Inc. v. Oreck Corp.</i> ,	
19	No. 07-9633, 2009 U.S. Dist. LEXIS 19097	
20	(E.D. La. Mar. 4, 2009).....	17
21	<i>Eminence Capital, LLC v. Aspeon, Inc.</i> ,	
22	316 F.3d 1048 (9th Cir. 2003).....	25
23	<i>Fireside Bank v. Superior Court</i> ,	
24	40 Cal. 4th 1069 (2007)	11
25	<i>Fundin v. Chicago Pneumatic Tool Co.</i> ,	
26	152 Cal. App. 3d 951 (1984).....	23
27	<i>Gruen v. Edfund & Van Ru Credit Corp.</i> ,	
28	No. 09-00644, 2009 U.S. Dist. LEXIS 60396	
	(N.D. Cal. July 15, 2009)	14
	<i>Hall v. Time</i> ,	
	158 Cal. App. 4th 847 (2008).....	11
	<i>Hartless v. Clorox Co.</i> ,	
	No. 06cv2705, 2007 U.S. Dist. LEXIS 81686	
	(S.D. Cal. Nov. 2, 2007)	21

1	<i>Hradel v. Griffith</i> ,	
2	367 F.2d 851 (C.C.P.A. 1966)	8
3	<i>In re Holmes</i> ,	
4	63 F.2d 642 (C.C.P.A. 1933)	8
5	<i>In re Mattel, Inc.</i> ,	
6	588 F. Supp. 2d 1111 (C.D. Cal. 2008).....	13
7	<i>In re Steroid Hormone Prod. Cases</i> ,	
8	No. B211968, 2010 Cal. App. LEXIS 154	
9	(Ct. App. Feb. 8, 2010)	11
10	<i>In re Tobacco II Cases</i> ,	
11	46 Cal. 4th 328 (2008)	<i>passim</i>
12	<i>Jenkins v. McKeithen</i> ,	
13	395 U.S. 411 (1969).....	13
14	<i>Johns v. Bayer Corp.</i> ,	
15	No. 09CV1935, 2010 U.S. Dist. LEXIS 10926	
16	(S.D. Cal. Feb. 9, 2010)	13, 14
17	<i>Johns v. Bayer Corp.</i> ,	
18	No. 09CV1935, 2010 U.S. Dist. LEXIS 62804	
19	(S.D. Cal. June 24, 2010)	14
20	<i>Koh v. S.C. Johnson & Son, Inc.</i> ,	
21	No. C-09-00927 RMW, 2010 U.S. Dist. LEXIS 654	
22	(N.D. Cal. Jan. 5, 2010)	10
23	<i>Korea Supply Co. v. Lockheed Martin Corp.</i> ,	
24	29 Cal. 4th 1134 (2003)	21
25	<i>Kowalsky v. Hewlett-Packard Co.</i> ,	
26	No. 10-CV-02176-LHK, 2010 U.S. Dist. LEXIS 131711	
27	(N.D. Cal. Dec. 13, 2010)	12
28	<i>Kwikset Corp. v. Superior Court</i> ,	
	51 Cal. 4th 310 (2011)	1, 4, 9, 10
	<i>Lavie v. Proctor & Gamble Co.</i> ,	
	105 Cal. App. 4th 496 (2003).....	22
	<i>Lima v. Gateway, Inc.</i> ,	
	710 F. Supp. 2d 1000 (C.D. Cal. 2010).....	16
	<i>Marilao v. McDonald's Corp.</i> ,	
	632 F. Supp. 2d 1008 (S.D. Cal. 2009).....	10

1	<i>Mass. Mut. Life Ins.,</i>	
2	97 Cal. App. 4th 1282 (2002).....	11, 19
3	<i>McKell v. Washington Mut., Inc.,</i>	
4	142 Cal. App. 4th 1457 (2006).....	4, 20, 22, 23
5	<i>Meyer v. Sprint Spectrum L.P.,</i>	
6	45 Cal. 4th 634 (2009)	16
7	<i>Morey v. NextFoods, Inc.,</i>	
8	No. 10 CV 761 JM (NLS), 2010 U.S. Dist. LEXIS 67990	
9	(S.D. Cal. June 7, 2010)	10, 11, 12, 24
10	<i>Morgan v. AT&T Wireless Servs. Inc.,</i>	
11	177 Cal. App. 4th 1235 (2009).....	11, 17
12	<i>Natural Res. Defense Council v. Southwest Marine, Inc.,</i>	
13	28 F. Supp. 2d 584 (S.D. Cal. 1998)	13
14	<i>Olivera v. Am. Home Mortgage Servicing, Inc.,</i>	
15	689 F. Supp. 2d 1218 (N.D. Cal. 2010)	11
16	<i>People ex rel. Lockyer v. Fremont Life Ins. Co.,</i>	
17	104 Cal. App. 4th 508 (2002).....	20
18	<i>Peterson v. Cellco P'ship,</i>	
19	164 Cal. App. 4th 1583 (2008).....	9, 10
20	<i>Pizza Hut, Inc. v. Papa John's Int'l, Inc.,</i>	
21	227 F.3d 489 (5th Cir. 2000).....	17
22	<i>Rubio v. Capital One Bank,</i>	
23	613 F.3d 1195 (9th Cir. 2010).....	6, 16, 22
24	<i>Sanderson v. HCA—The Healthcare Co.,</i>	
25	447 F.3d 873 (6th Cir. 2006).....	14
26	<i>Sarausad v. Porter,</i>	
27	503 F.3d 822 (9th Cir. 2007).....	21
28	<i>Schnall v. Hertz Corp.,</i>	
	78 Cal. App. 4th 1144 (2000).....	23
	<i>Smith v. Wells Fargo Bank, N.A.,</i>	
	135 Cal. App. 4th 1463 (2005).....	21
	<i>State Farm Fire & Cas. Co. v. Superior Court,</i>	
	45 Cal. App. 4th 1093 (1996).....	21

1	<i>Sybersound Records, Inc. v. UAV Corp.</i> ,	
2	517 F.3d 1137 (9th Cir. 2007).....	21
3	<i>Tanoh v. Dow Chem. Co.</i> ,	
4	561 F.3d 945 (9th Cir. 2009).....	12
5	<i>Thrifty Oil Co. v. Linder</i> ,	
6	91 Cal. App. 4th 1070 (2001).....	18
7	<i>Troyk v. Farmers Group, Inc.</i> ,	
8	171 Cal. App. 4th 1305 (2009).....	10
9	<i>United States v. Ninety-Five Barrels</i> ,	
10	265 U.S. 438 (1924).....	1
11	<i>Vasquez v. Superior Court</i> ,	
12	4 Cal. 3d 800 (1971)	11, 23
13	<i>Von Koenig v. Snapple Bev. Corp.</i> ,	
14	713 F. Supp. 2d 1066 (E.D. Cal. 2010).....	10, 12
15	<i>Waldman v. New Chapter, Inc.</i> ,	
16	714 F. Supp. 2d 398 (E.D.N.Y. 2010)	19
17	<i>Warshaw v. Xoma Corp.</i> ,	
18	74 F.3d 955 (9th Cir. 1996).....	14
19	<i>Weinstat v. Dentsply Int'l, Inc.</i> ,	
20	180 Cal. App. 4th 1213 (2010).....	23, 24
21	<i>West v. Am. Tel. & Tel. Co.</i> ,	
22	311 U.S. 223 (1940).....	21
23	<i>Wilkins v. Nat'l Broad. Co., Inc.</i> ,	
24	71 Cal. App. 4th 1066 (1999).....	20
25	<i>Williams v. Gerber Prods. Co.</i> ,	
26	552 F.3d 934 (9th Cir. 2008).....	<i>passim</i>
27	STATUTES, RULES AND REGULATIONS	
28	Business & Professions Code	
	§17200.....	20, 21
	§17204.....	9
	§17500.....	21
	California Uniform Commercial Code	
	§2313(1).....	23

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1	Civil Code	
	§1572.....	21
2	§1573.....	21
	§1709.....	21
3	§1711.....	21
	§1770.....	9, 15, 16
4	§1780(a).....	9, 16
5		
6	Federal Rules of Civil Procedure	
	Rule 8.....	14, 22
7	Rule 9.....	13, 14, 15
8	Rule 9(b).....	14, 15, 22
9	SECONDARY AUTHORITIES	
10	Class Action Fairness Action, 199 Stat. 4	
11	§2.....	12

I. Introduction

"It is not difficult to choose statements, designs and devices which will not deceive."

United States v. Ninety-Five Barrels, 265 U.S. 438, 443 (1924).¹ Over 80 years later, the California Supreme Court affirmed this common-sense principle:

Simply stated: labels matter. The marketing industry is based on the premise that labels matter, that consumers will choose one product over another similar product based on its label....

Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 328 (2011).

Here, the Procter & Gamble Company ("P&G") uses its labels to deceive consumers into believing that its higher-priced Fusion Power razor blades provide a superior shaving experience to its lower-priced Fusion manual blades, and are required for use with its higher-priced Fusion Power razor handles, and that the lower-priced Fusion manual blades can only be used with its lower-priced Fusion manual razor handle.

To convey this message, P&G differentiates between the two types of systems by: naming the expensive blades Fusion Power to correspond to the Fusion Power handles; color coding the shaving systems (royal blue for the Fusion manual and orange for the Fusion Power) so that consumers can readily match the razors to handles; prominently labeling the orange blades with the "Power" moniker; falsely representing that only the Fusion Power blades have "a patented blade coating," including a Fusion Power razor blade with the initial purchase of a Fusion Power handle; and charging more for the Fusion Power blades to convey to consumers that there is a meaningful difference. The packages of each system appear as follows:

¹ Citations are omitted and emphasis is added throughout unless otherwise noted.



See Complaint at ¶12.²

The problem, however, is that the razor blades are the same. The Fusion Power blades and the Fusion manual blades are wholly interchangeable and provide the same shaving experience. Despite P&G's advertising to the contrary, the only material difference is the color of the packaging, the word "Power" and the price. The retail price for a four-pack of Fusion Power replacement blades is about 20% more than the retail price for a four-pack of Fusion manual replacement blades.

Based on these facts, plaintiff brings this consumer fraud and false advertising action, alleging violation of California's Unfair Competition Law ("UCL"), violation of California's Consumer Legal Remedies Act ("CLRA"), and breach of express warranty.

II. Defendant's Motion to Dismiss

P&G asks for a complete dismissal by mischaracterizing plaintiff's Complaint as something that is almost entirely unlike the Complaint. Despite the inventiveness of P&G's lawyers, the Complaint is *not*: a "misunderstanding that 'orange' is better than 'blue,'" like dictating that Apple should not charge more for "a white iPod over the [otherwise identical]

² "Complaint" refers Class Action Complaint filed November 2, 2010, Docket Entry ("D.E.") 1. All "¶" references are to the Complaint.

black version,” or similar to differential product pricing “between a name-brand and a generic version.” Def’s Mem. at 10.³ P&G’s conduct is deceptive because its package (and other advertising material) represents that there are meaningful differences that justify a price differential when, in fact, those differences do not exist. This is not a “misunderstanding,” but false advertising.

In 2008, the Ninth Circuit reversed the dismissal of UCL and CLRA claims in the consumer product false advertising class action, *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008). In *Williams*, the Ninth Circuit analyzed whether packaging and labeling of Gerber’s “Fruit Juice Snacks” were likely to deceive a reasonable consumer through the product name, pictures, and labeling statements that the products contained fruit juice. P&G all but ignores *Williams*, relegating it to a cursory and dismissive footnote. Def’s Mem. at n.5 (“our case is fundamentally different from *Williams*”). Instead, P&G repeatedly attempts to analogize the Complaint to cases where the conduct alleged was clearly not deceptive. No reasonable person would believe that Cap’n Crunch with Crunchberries cereal does not actually contain a fruit apparently called the “crunchberry,” or that there is no fruit in Froot Loops cereal.⁴

³ “Def’s Mem.” refers to Defendant The Procter & Gamble Company’s Memorandum of Points and Authorities in Support of Motion to Dismiss, D.E. 9-1.

⁴ See, e.g., Def’s Mem. at 5, 9 (citing *Sugawara v. Pepsico, Inc.*, No. 2:08-1335-MCE-JFM, 2009 U.S. Dist. LEXIS 43127, at *8 (E.D. Cal. May 20, 2009) (“This Court is not aware of ... any actual fruit referred to as a ‘crunchberry.’”)); at 5 (citing *McKinniss v. Kellogg USA*, No. CV 07-2611 ABC (RCx), 2007 U.S. Dist. LEXIS 96106, at *11-*12 (C.D. Cal. Sept. 19, 2007) (“No reasonable consumer would view the trademark “FROOT LOOPS” name as describing the ingredients in the cereal.... Plaintiffs’ allegation that the cereal pieces themselves resemble fruit is not rational, let alone reasonable.”)); at 5, 8 (citing *Videtto v. Kellogg USA*, No. 2:08-cv-1324-MCE-DAD, 2009 U.S. Dist. LEXIS 43114, at *8 (E.D. Cal. May 20, 2009) (“Defendant uses the word ‘Froot’ as part of its trademarked name, and the fanciful use of a nonsensical word cannot reasonably be interpreted to imply that the Product contains or is made from actual fruit.”)); at 8, 18 (citing *McKinniss v. General Mills, Inc.*, CV 07-2521 GAF (FMOx), 2007 U.S. Dist. LEXIS 96107, at *15-*16 (C.D. Cal. Sept. 18, 2007) (“an image of a fruit (the purple Cheerio ‘fruit’) is permitted to indicate that product’s ‘characterizing flavor’ and is not an affirmation that the product contains any fruit at all”)).

1 Beyond ignoring controlling law and analogizing to inapplicable opinions, P&G's
2 arguments are built upon a series of mischaracterizations of plaintiff's allegations, the facts,
3 and applicable law.

4 First, P&G mischaracterizes the allegations about plaintiff's experience and argues that
5 plaintiff has not alleged reliance, deception or has suffered harm, and therefore has no
6 standing. Def's Mem. at 20-21. Plaintiff's allegations are straightforward and clear: plaintiff
7 purchased the more expensive Fusion Power blade cartridges in reliance on P&G's false
8 advertising that these blades were superior to the less expensive blades, thereby spending
9 more money for something he did not receive. ¶¶7, 22, 29, 36, 54. The payment of money in
10 reliance on P&G's misrepresentations meets the "lost money or property" requirement of the
11 UCL. Plaintiff hopes P&G will formally withdraw this argument, which is frivolous after the
12 California Supreme Court's recent decision in *Kwikset Corp.*, 55 Cal. 4th at 332-35, which
13 expressly rejected each of the arguments P&G makes here.

14 Second, P&G makes the misplaced, merits-based contention that because one of the
15 components of the Fusion Power blade has a patent based on characteristics and benefits the
16 blade does not have (the higher price it charges), is nonetheless *per se* justified. Def's Mem. at
17 3. Nonsense. To receive a patent, there is no requirement that the invention be superior to or
18 even have greater utility than alternatives. *Chiron Corp. v. Genentech, Inc.*, 268 F. Supp. 2d
19 1148, 1168 (E.D. Cal. 2002). In fact, the patent application itself reveals there are no material
20 benefits, a fact P&G ignores.

21 Third, P&G argues there are no actionable "statements of fact ... that can be proven
22 false." Def's Mem. at 1. Not only is this argument based on an improper factual premise
23 about "proof," P&G misstates applicable law. Unfair business practices are actionable under
24 the UCL and CLRA if they are likely to deceive the reasonable consumer, including
25 representations on labels (including pictures and logos), omissions, and even "perfectly true
26 statement[s] couched in such a manner that [are] likely to mislead or deceive the consumer..."
27 *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1471 (2006). Here, P&G uses its
28 labels and other advertisements to represent that Power Fusion blades are better than Fusion

1 manual blades and should be used with the Power Fusion handle, which is why it is able to
2 charge a price premium.

3 In arguing that its claims are not deceptive, P&G also misleadingly (and, at this stage,
4 improperly) contends that its false advertising is adequately disclaimed by different statements
5 on the back of its packaging. Def's Mem. at 2, 7-8. The ambiguous fine-print tucked away on
6 the back of the package does not say that the blades are functionally identical. Instead, the
7 statement provides:⁵



19 A defendant does not escape liability by making false representations, then disclaiming
20 it elsewhere. Disclaimers, even unambiguous ones, do not preclude liability where “members
21 of the public are likely to be deceived.” *Williams*, 552 F.3d at 938-40. In *Williams*, where the
22 defendant provided a more unambiguous disclaimer than does P&G, the Ninth Circuit rejected
23 the disclaimer argument advanced here:

24 We disagree with the district court that reasonable consumers should be
25 expected to look beyond misleading representations on the front of the box to
26 discover the truth from the ingredient list in small print on the side of the

27 ⁵ The fine print on the Fusion Power blade packaging states: “For best results, power up
28 with the Fusion Power razor. Fusion Power cartridges can be used with all Fusion razors.”
The fine-print on the Fusion manual blade packaging states: “All Fusion cartridges can be used
with all Fusion razors.”

1 box.... We do not think that the FDA requires an ingredient list so that
 2 manufacturers can mislead consumers and then rely on the ingredient list to
 3 correct those misinterpretations and provide a shield of liability for the
 4 deception.

5 *Id.* at 939; *see also Rubio v. Capital One Bank*, 613 F.3d 1195, 1204-05 (9th Cir. 2010)
 6 (reasonable consumers were likely to be deceived by defendant's solicitation promise of a "fixed
 7 APR" despite an unqualified disclaimer that the APR was "subject to change").

8 For purposes of a motion to dismiss, the determination of whether an advertisement,
 9 including a label, is false or misleading under California's consumer protection laws is a fact-
 10 intensive one, not suitable to dismissal at the pleading stage. *Williams*, 552 F.3d at 939. In
 11 addition, the entire advertisement, which includes product labels, should be viewed as a whole,
 12 and not in isolation, as P&G does in its motion. *Id.* at 939, n.3; *see also* Def's Mem. at 4
 13 (mischaracterizing the allegations as challenging "disparate" messages).

14 As to the breach of warranty claim, P&G's argument that it cannot discern the terms of
 15 the express warranty is feigned absurdity. Plaintiff does not just repeat verbatim the terms of
 16 the warranty, but includes pictures in the Complaint of the warranty language on the label.
 17 ¶12. Finally, P&G's argument that plaintiff lacks standing to pursue injunctive relief on behalf
 18 of the Class fails. Inquiry into appropriate remedies – remedies specifically provided under
 19 California's consumer protection statutes – is inappropriate at this stage.

20 **III. Statement of the Case**

21 **A. P&G's Deceptive Message**

22 P&G advertises and sells shaving systems (razor blade handles and razor blade
 23 cartridges) called Gillette Fusion manual and Gillette Fusion Power. The Fusion Power handle
 24 contains a battery operated device which causes the blade cartridge to vibrate, apparently
 25 resulting in a closer, more comfortable shave. P&G also has two different types of blades –
 26 Fusion Power blades for the Fusion Power system and Fusion manual blades for the Fusion
 27 manual system. P&G advertises the Fusion Power system, including the Fusion Power
 28 replacement blades, as providing a closer, more comfortable shaving experience.

Through a broad based campaign, P&G advertises that its more expensive Fusion Power razor handles should be paired with its more expensive Fusion Power blades, and Fusion manual and Fusion Power blades are different from each other in ways that are meaningful to the user. ¶1. P&G communicates the deceptive message through a combination of deceptive statements and omissions:

- First, it names the expensive blades “Fusion Power,” corresponding with the name of the battery operated “Fusion Power” handle. It names the less expensive blades simply “Fusion manual” blades, corresponding with the name of the less expensive handle that does not have a battery. ¶¶3, 12-13.

- Second, it color codes the two shaving systems so the consumer can readily match up the handles with the replacement blades. Fusion manual handles and blade cartridges, along with their packaging, are royal blue. Fusion Power handles and blade cartridges, along with their packaging, are orange. ¶¶3, 12-13.

- Third, it prominently labels the orange blades with the “Power” moniker. ¶¶3, 12-13.

- Fourth, it states on the label of the Fusion Power blades that those blades have “a patented blade coating for incredible comfort.” The coating is “telomer.” However, the Fusion manual blades are also coated with telomere, though the Fusion manual blades package fails to disclose this. ¶¶3, 14-15.

- Fifth, it charges more for the Fusion Power blades than for the Fusion manual blades, further indicating the existence of a meaningful difference between the two types of blade cartridges that does not exist. ¶¶2-3, 12-13, 18.

- Finally, when it sells the Fusion Power blade handles, P&G gives the consumer a Fusion Power blade in the handle, but not a Fusion manual blade. ¶12.

In reality, there is no difference between the Fusion Power and Fusion manual blade cartridges other than the price. ¶¶2-3, 12-18. The retail price for a four-pack of Fusion Power blades is approximately 20% more than the retail price for a four-pack of Fusion manual blades. ¶2. The only reason one would purchase the Fusion Power blades instead of the

1 Fusion manual blades is because one would believe there was a meaningful difference between
 2 the two, or one must use the Fusion Power blades with the Fusion Power handle. Not
 3 surprisingly, plaintiff Edmundson read the claims on the Fusion Power label, believed they
 4 were true, and purchased Power Fusion in reliance on P&G's advertised claims. ¶7.

5 **B. P&G's Back of Packaging "PowerGlide" Statement Adds to the**
 6 **Deceptive Message**

7 P&G is correct that, as alleged in ¶¶16-17, a coating on part of the Fusion Power blade
 8 – the so-called "PowerGlide" coating – received a patent. However, P&G is wrong that this
 9 means the Fusion Power cartridge has "an advanced feature," "is better," or justifies the price
 10 premium and negates the deceptive advertising. Nor does plaintiff concede that there "may be
 11 real 'measureable' differences" between the blades. *Compare* Def's Mem. at 3 with ¶¶14-17
 12 ("there is no material difference" between the blades). Most important, the mere existence of a
 13 patent has *no* relevance to this motion. In truth, the admissions surrounding the PowerGlide's
 14 patent application are further evidence of P&G's deceptive message. *See* ¶¶16-17.

15 As alleged, in the PowerGlide's patent application, P&G concedes that at best, any
 16 possible utility is limited to first blade strokes, and even then only to a dry shave. ¶¶16-17.
 17 Neither P&G's motion nor its product packaging hint at this material fact. Instead, P&G's
 18 motion and packaging deceptively transform the existence of a patent into an admission that
 19 the telomer coating on the Fusion Power cartridge is "better" than the telomer coating on the
 20 Fusion manual cartridge. While true that an invention must be useful to receive a patent, "the
 21 fact that an invention has only limited utility [here: first shave] and is only operable in certain
 22 applications [here: dry shave] is not grounds for finding lack of utility." *Chiron Corp.*, 268 F.
 23 Supp. 2d at 1168 (quoting *Envirotech Corp. v. Al George, Inc.*, 730 F.2d 753, 762 (Fed. Cir.
 24 1984)). Further, "[a]n invention need not be the best or the only way to accomplish a certain
 25 result, and it need only be useful to some extent and in certain applications..." *Id.*; *see also*
 26 *Hradel v. Griffith*, 367 F.2d 851, 854 (C.C.P.A. 1966) ("Superiority need not be shown."); *In*
 27 *re Holmes*, 63 F.2d 642, 643 (C.C.P.A. 1933) ("if an invention be useful in itself, it is
 28 immaterial upon the question of patentability whether the invention be of greater or less

usefulness than like devices or products shown in the prior art"). Anything other than proof of "total incapacity" by clear and convincing evidence will not establish a non-utility defense under the patent laws. *Chiron*, 268 F. Supp. 2d at 1168 (citing *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1269 (Fed. Cir. 1986)). Thus, the fleeting and immaterial telomer coating on the Fusion Power cartridge (mentioned only on the back of the Fusion Power cartridge packaging) does not support P&G's Motion.

IV. Plaintiff's Economic Injury Provides Standing

A. UCL and CLRA Standing

Standing under the UCL requires that the named plaintiff has suffered injury in fact and has "lost money or property as a result of" defendant's unfair business practices. Bus. & Prof. Code §17204.⁶ Similarly, though it is not construed as standing requirement, under the CLRA an action may be brought by "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770." Civ. Code §1780(a).

1. Plaintiff Lost Money

The recent California Supreme Court decision in *Kwikset* has settled the issue of standing in UCL cases and, in doing so, has rejected P&G's very arguments and the cases upon which it relies. *See Kwikset*, 51 Cal. 4th at 332-35 (rejecting Court of Appeal's holding, and reliance on *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583 (2008), that "consumers who receive a fully functioning product have received the benefit of their bargain, even if the product label contains misrepresentations that may have been relied upon by a particular class of consumers").

P&G argues that plaintiff's payment of money is not "lost money" for UCL standing if he received the "benefit of the bargain," *i.e.*, if he paid for razor blades and got razor blades. Def's Mem. at 20-21 (citing *Peterson*, 164 Cal. App. 4th 1583 and *Hall v. Time*, 158 Cal. App.

⁶ P&G's standing argument for the UCL and CLRA is limited to statutory standing. P&G does not argue that plaintiff lacks standing under Article III's requirements (injury in fact, traceability, and redressability), which are all properly alleged. ¶7.

4th 847, 855 (2008)). However, *Kwikset* squarely rejected the “benefit of the bargain” argument, and the cases upon which P&G relies, and found that a plaintiff who purchases a product based on misrepresentations has standing. 51 Cal. 4th at 332 (rejecting *Peterson* and finding that plaintiffs who “bargained for locksets that were made in the United States [but] got ones that were not” had standing); *see also Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1348, n.30 (2009) (rejecting *Peterson’s* and *Hall’s* “benefit of the bargain” reasoning); *Aron v. U-Haul Co. of California*, 143 Cal. App. 4th 796, 802-03 (2006) (payment of money due to the defendant’s acts of unfair competition establish UCL standing); *Morey v. NextFoods, Inc.*, No. 10 CV 761 JM (NLS), 2010 U.S. Dist. LEXIS 67990 (S.D. Cal. June 7, 2010), at *5 (“Plaintiff’s allegations that she purchased GoodBelly products in reliance on NextFood’s advertising is sufficient to create standing under [the UCL].”).⁷

Even if the faulty “benefit of the bargain” reasoning were applied, plaintiff did not receive the product he “bargained” for because he paid for Fusion Power razor blades that cost substantially more than the materially identical Fusion manual cartridges. *Kwikset*, 51 Cal. 4th at 334 (“[A] buyer forced to pay more than he or she would have is harmed at the moment of purchase, and further inquiry ... is unnecessary.”); *Von Koenig v. Snapple Bev. Corp.*, 713 F. Supp. 2d 1066, 1078 (E.D. Cal. 2010) (“a plaintiff may sufficiently allege injury [under the UCL and CLRA] where she contends that she did not receive the benefit of the bargain because a purchased product cost more than similar products without misleading labeling”); *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927 RMW, 2010 U.S. Dist. LEXIS 654, at *4-*5 (N.D. Cal. Jan. 5, 2010) (same); ¶53 (P&G acted improperly “by not providing the Fusion Power cartridges as described above and which could provide the benefits described above.”); *Contra. Peterson*, 164 Cal. App. 4th at 1591 (“[Plaintiffs] received the benefit of their bargain, having obtained the bargained for insurance at the bargained for price”).

⁷ P&G’s citation to *Marilao v. McDonald’s Corp.*, 632 F. Supp. 2d 1008, 1013 (S.D. Cal. 2009), where plaintiff complained that he could not redeem his free McDonald’s gift card for cash, is not relevant to these facts. Def’s Mem. at 21; ¶7 (plaintiff spent money on Fusion Power blade cartridges).

P&G also cites to *Hall*, 158 Cal. App. 4th at 854, although even *Hall* establishes plaintiff's standing under these circumstances. Def's Mem. at 21. *Hall* notes that a plaintiff has standing when he pays higher insurance premiums because he "expended money due to the defendant's act of unfair competition." 158 Cal. App. 4th at 854.

2. Plaintiff Adequately Pleads Reliance

P&G contends that plaintiff does not allege that he relied on the misrepresentations. Def's Mem. at 20. This is simply false. Plaintiff "purchased Fusion Power cartridges in reliance on these claims." ¶7. P&G next argues (by citing to an unpublished district court opinion) that plaintiff's "conclusory" allegations are insufficient."⁸ Def's Mem. at 20.

P&G is wrong again. Plaintiff need not "plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements" when the unfair practice is a fraudulent advertising campaign and need not "demonstrate individualized reliance on specific misrepresentations to satisfy the reliance requirement." *Tobacco II*, 46 Cal. 4th at 327-328; see also *Morgan v. AT&T Wireless Servs. Inc.*, 177 Cal. App. 4th 1235, 1258 (2009) ("Plaintiffs were not required, as AT&T asserts, to plead the specific advertisements or representations they relied upon in making their decision to purchase the [product]."). Moreover, reliance is presumed where the misrepresentation is a material misrepresentation or omission. *Mass. Mut. Life Ins.*, 97 Cal. App. 4th 1282, 1294-95 (2002); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 814 (1971). Indeed, very similar reliance allegations have been found sufficient. In *Morey*, plaintiff alleged she "was exposed to and saw NextFood's claims by reading the product label, purchased GoodBelly products in reliance on these claims, and

⁸ Named plaintiff reliance is only required for UCL "fraudulent" prong claims. *In re Tobacco II Cases*, 46 Cal. 4th 328, 326, n.17 (2008) ("There are doubtless many types of unfair business practices in which the concept of reliance, as discussed here, has no application."); *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1090 (2007) (applying different causation standard to unlawful prong); *In re Steroid Hormone Prod. Cases*, No. B211968, 2010 Cal. App. LEXIS 154, at *3 (Ct. App. Feb. 8, 2010) ("where the UCL claim is based upon the unlawful prong of the UCL" there is "no issue regarding reliance"); *Olivera v. Am. Home Mortgage Servicing, Inc.*, 689 F. Supp. 2d 1218, 1224 (N.D. Cal. 2010) ("For claims based on the 'unfair' or 'unlawful' prong of the UCL claim, courts have held that the plaintiff ... may allege 'causation more generally.'"). P&G does not bother to distinguish the various causation standards used for the different UCL prongs.

suffered injury in fact and lost money as result of the unfair competition.” 2010 U.S. Dist. LEXIS 67990 at *4. Judge Miller found that though “Plaintiff’s allegations regarding reliance and injury are indeed ‘short and plain’ ... they nonetheless give NextFoods sufficient notice of the claim” and lay “out the required causal connection between ‘reading the product label’ and purchasing the product ‘in reliance on these claims.’” *Id.*⁹

B. Standing for Injunctive Relief

P&G argues plaintiff lacks standing to seek the statutory remedy of injunctive relief because he is now aware of P&G’s misrepresentations and thus cannot be harmed by them in the future. Def’s Mem. at 23. Under P&G’s theory of standing, no plaintiff in any false advertising case could obtain injunctive relief in federal court. This is wholly contrary to the purpose of California’s consumer protection statutes. As the California Supreme Court stated in *Tobacco II*, “the primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction ... [t]he purpose of such relief ... is to protect California’s consumers against unfair business practices by stopping such practices in their tracks.”¹⁰ 46 Cal. 4th at 319-20. To this end, federal courts routinely permit injunctive relief in false advertising cases. *See, e.g., Kowalsky v. Hewlett-Packard Co.*, No. 10-CV-02176-LHK, 2010 U.S. Dist. LEXIS 131711, *4, *37-*39 (N.D. Cal. Dec. 13, 2010) (denying motion to dismiss UCL and CLRA claims for injunctive relief based on false advertising of printer’s abilities); *Von Koenig*, 713 F. Supp. 2d at 1080 (denying motion to dismiss UCL and CLRA claims for injunctive relief based on false advertising of beverages as “all natural”).

⁹ Nothing in *Brownfield v. Bayer Corp.*, No. 2:09-cv-00444-JAM-GGH, 2009 U.S. Dist. LEXIS 63057, at *11 (E.D. Cal. July 2, 2009), cited by defendant, requires a different conclusion because in *Brownfield*, plaintiffs did not allege they had ever “viewed” either of the two television commercials at issue.

¹⁰ P&G’s theory of standing also defeats the purpose of the Class Action Fairness Act (“CAFA”) jurisdiction and leaves the federal courts hamstrung in providing complete relief to consumers in false advertising cases. *See* CAFA, 199 Stat. 4, §2 at 5 (CAFA is intended to “assure fair and prompt recoveries for class members with legitimate claims ... by providing for Federal court consideration of interstate cases of national importance ... and [] benefit society by [] lowering consumer prices.”); *see also Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 (9th Cir. 2009) (quoting same).

Because plaintiff has demonstrated standing to litigate the case in controversy that is before the court, analysis into whether plaintiff has standing to seek a particular remedy afforded by the statutes under which he sues is improper. *See Natural Res. Defense Council v. Southwest Marine, Inc.*, 28 F. Supp. 2d 584, 586 (S.D. Cal. 1998) (“A party either has standing for the purposes of the ‘case or controversy’ requirement of Art. III or it does not. That simple inquiry regarding a party’s injuries and their justiciability for purposes of the case – though fraught with difficulties – is not further extended into, and made more troublesome by, a microscopic analysis of standing for each remedy sought.”); *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969) (“[T]he concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought.”). Accordingly, P&G’s challenge to plaintiff’s request for injunctive relief should be denied.¹¹

V. Rule 9 Does Not Apply But Is Satisfied Nonetheless

A. Rule 9 Does Not Apply

Mr. Edmundson’s UCL and CLRA false advertising claims are “distinct from common law fraud.” *Tobacco II*, 46 Cal. 4th at 312. “A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim ... under the UCL.” *Id.*; *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332 (1998). This distinction reflects the UCL’s focus on the defendant’s conduct, rather than the plaintiff’s damages, in service of the statute’s larger purpose of protecting the general public against unscrupulous business practices. *Tobacco II*, 46 Cal. 4th at 312. For example, in *Johns v. Bayer Corp.*, No. 09CV1935, 2010 U.S. Dist. LEXIS 10926, at *13-*14 (S.D. Cal. Feb. 9, 2010), the court held that false advertising claims under the UCL and CLRA were not “grounded in fraud” and therefore, Rule 9 did not apply because plaintiff did not allege *all* of the elements of fraud, namely, knowledge of falsity or intent to induce reliance. *See also In re Mattel, Inc.*, 588 F. Supp. 2d

¹¹ If this court finds plaintiff lacks standing to assert injunctive relief here, plaintiff intends to file a separate action in state court seeking such relief. *See Deitz v. Comcast Corp.*, No. C 06-06352 WHA, 2006 U.S. Dist. LEXIS 94333 (N.D. Cal. Dec. 21, 2006), at *12 (plaintiff may split his claim and seek injunctive relief in state court).

1111, 1118 (C.D. Cal. 2008) (same); *Gruen v. Edfund & Van Ru Credit Corp.*, No. 09-00644, 2009 U.S. Dist. LEXIS 60396, at *15 (N.D. Cal. July 15, 2009) (Rule 9(b) does not apply where “Plaintiff merely alleges representations that were likely to deceive and does not allege an overarching fraudulent scheme to defraud.”). The *Johns* court declined to revisit its previous ruling on the Rule 9 issue in a subsequent motion to dismiss. *See Johns v. Bayer Corp.*, No. 09CV1935, 2010 U.S. Dist. LEXIS 62804, *10, n.2 (S.D. Cal. June 24, 2010).

Plaintiff does not allege, because he does not have to, intent by defendant to deceive him or his fellow class members. Nor does plaintiff allege class wide reliance or damages in his UCL claim as these are not elements under the UCL. Moreover, the claims under the UCL’s “unfair” prong are not grounded in fraud. Accordingly, Rule 9 does not apply.

B. Regardless, Plaintiff’s Allegations Meet Rule 9(b)’s Particularity Requirement

Even if Rule 9(b) is applied, the particularity requirement must be read in harmony with Rule 8’s requirement of a “short and plain” statement of the claim. *Sanderson v. HCA—The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006). Rule 9(b) only requires that allegations regarding the circumstances constituting the fraud be “specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001); *Warshaw v. Xoma Corp.*, 74 F.3d 955, 960 (9th Cir. 1996) (“[A] pleading is sufficient under Rule 9(b) if it identifies the circumstances of the alleged fraud so that the defendant can prepare an adequate answer.”); *Cooper v. Pickett*, 137 F.3d 616, 625 (9th Cir. 1997) (holding that plaintiff need only “set forth what is false or misleading about a statement, and why it is false”).

Here, the Complaint without question gives fair notice of the alleged misconduct. P&G knows the exact representations at issue (the Complaint reprints and attaches the advertisements), and when and where they were made. ¶3; *see also* ¶12 (“Since the 2006 launch of the Fusion system, P&G[] has consistently advertised....”); ¶12 (“P&G has done this through package color coding, prominently placing ‘Power’ on the front of the Fusion Power

blade cartridge packaging, and by the price differential.”); ¶14 (“Those consumers that view and compare the backsides of the Fusion manual and Fusion Power cartridge packages are even further deceived [because] ... P&G states that”); ¶39 (the representations are ongoing, defendant “continue[s] to engage in the above-described conduct”). The Complaint also describes why these allegations are likely to deceive the reasonable consumer. ¶1 (“the [Fusion Power and Fusion manual] cartridges are not meaningfully different, and P&G has no proof that they are”); ¶3 (“there is no difference between the blade cartridges, other than the price”); ¶¶16-17 (the utility of the PowerGlide coating is limited to first shaves “when shaving a dry beard”). See *Chacanaca v. Quaker Oats Co.*, No. 10-0502, 2010 U.S. Dist. LEXIS 111981, at *39-*40 (N.D. Cal. Oct. 14, 2010) (finding Rule 9(b) was satisfied where “plaintiffs have identified the particular statements they allege are misleading, the basis for that contention, where those statements appear on the product packaging, and the relevant time period in which the statements were used”). Moreover, P&G concedes knowing what message is at issue: “Plaintiff refers to this combination as the ‘deceptive message.’” Def’s Mem. at 7.

In the face of the detailed Complaint, and its concession that it understands the deceptive message at issue, P&G’s argument about plaintiff’s “strategic vagueness” is a bit of a joke. To the extent that Rule 9 even applies, plaintiff has met it.

VI. Plaintiff States a Claim Under the CLRA

P&G spills much ink arguing that because there are no actionable misrepresentations or omissions, plaintiff does not allege a violation of the CLRA. See Def’s Mem. at 5-15. To reach its conclusion, P&G relies upon the series of nonsensical mischaracterizations.

The CLRA “prohibits unfair methods of competition and unfair or deceptive acts or practices.” *Williams*, 523 F.3d at 938; Civ. Code §1770. “[C]laims under the[] [UCL and CLRA] are governed by the reasonable consumer test.” *Williams*, 523 F.3d at 938. Representations are actionable under the CLRA if they are “likely to deceive” a reasonable consumer. *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1358-60 (2003). Under both the CLRA and UCL “[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by a failure to disclose

1 other relevant information, is actionable.” *Day*, 63 Cal. App. 4th at 332. An action may be
 2 brought under the CLRA by “[a]ny consumer who suffers any damage as a result of the use or
 3 employment by any person of a method, act, or practice declared to be unlawful by Section
 4 1770.” Civ. Code §1780(a). That is, a consumer must be exposed to an unlawful practice, and
 5 some kind of damage must result. *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641 (2009).
 6 As noted throughout this opposition, plaintiff was exposed to and read P&G’s false
 7 advertising, purchased premium-priced Fusion Power blades in reliance on the false
 8 advertising, and was thereby injured and lost money. Thus, plaintiff properly alleges the
 9 elements of a CLRA claim.

10 First, P&G’s fine-print, vague and ambiguous statements on the back of the Fusion
 11 Power and Fusion manual blade packages do **nothing** to cure the deceptive message at issue.
 12 See *Williams*, 523 F.3d at 939; *Rubio*, 613 F.3d at 1204-05. Nor do its counsel’s clever
 13 characterizations of the fine-print accurately portray the statements. For example, **nowhere**
 14 on the Fusion Power cartridge does P&G state “products within the Fusion family work
 15 together and that either a Fusion [manual] or Fusion Power blades can be used with a Fusion
 16 Power handle.” Def’s Mem. at 8; see also *id.* at 17 (the Fusion Power packaging “states that
 17 consumers can use either cartridge with either handle”).

18 Second, plaintiff does not challenge “disparate” advertising statements. Def’s Mem. at
 19 7. Rather, plaintiff alleges that the deceptive message is conveyed in a number of ways (name,
 20 color, price, and PowerGlide) that build upon each other in collective furtherance of the
 21 message. ¶¶1, 3, 12-13. Whether an advertisement, including a label, is false or misleading
 22 under California’s consumer protection laws is fact-intensive one where the entire
 23 advertisement should be viewed as a whole, and not in isolation, as P&G does in its motion.
 24 *Williams*, 552 F.3d at 939 (refusing to dismiss statement as puffery where the packaging as a
 25 whole gave context to the subject claim); *Lima v. Gateway, Inc.*, 710 F. Supp. 2d 1000, 1007
 26 (C.D. Cal. 2010) (holding that statements that may be considered puffery on their own “cannot
 27 be considered in isolation because they contribute to the deceptive context of the advertising as
 28 a whole” and “The relevant question is whether the statements, taken as a whole, are likely to

deceive members of the public.”); *Morgan*, 177 Cal. App. 4th at 1256-57 (considering the effect of all of AT&T’s representations to determine whether consumers were “‘likely to be deceived’”).¹² For example, in *Chacanaca*, the court rejected Quaker Oats’ argument that the word “wholesome,” the product decal “smart choices made easy,” and photographic depictions of oats, nuts, and children in soccer uniforms were either true or constitute puffery, and thus non-actionable, in a UCL and CLRA action about labeling granola bars to suggest they were healthy when in fact they contained dangerous amount of trans fat. 2010 U.S. Dist. LEXIS 111981, at *36-*38. The court analyzed the words, phrases, and pictures in context and stated that “the Court cannot resolve at this juncture the issue of whether or not a reasonable consumer might be duped.” *Id.* at *38.

Thus, the alleged message is not simply the name of the products. Def’s Mem. at 8. Nor, as explained above, do the facts in the Crunchberries, FROOT LOOPS, and Berry Berry Trix cases aid P&G. Here, as in *Williams* (where naming the products “Fruit Juice Snacks contributed to the deception), the “Power” moniker that P&G chose to apply to its orange and more expensive blades contributes to the deceptive message. Tellingly, P&G never suggests a rational, let alone non-deceptive, reason why it chose the “Power” moniker for its more expensive and orange Fusion Power blades.

¹² Contrary to P&G’s contention, because of the “basic legal principle” that a particular advertising statement must be considered within the context of the whole advertisement and advertising campaign, even general statements such as Papa John’s slogan “‘Better Ingredients. Better Pizza’” are actionable statements of fact. *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 501-02 (5th Cir. 2000); *see also Dyson, Inc. v. Oreck Corp.*, No. 07-9633, 2009 U.S. Dist. LEXIS 19097, at *20-*21 (E.D. La. Mar. 4, 2009) (“while the word ‘bulky’ may be puffery standing alone ... [i]n context the claim is that the Dyson, in contrast to the slimmer Oreck, is too large (*i.e.*, bulky) to clean under furniture of a certain height”); *Clorox Co. P.R. v. P&G*, 228 F.3d 24, 38-39 (1st Cir. 2000) (a campaign tag line “Whiter is not possible” must be looked at in context and is not puffing); *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 945-46 (3d Cir. 1993) (despite not mentioning its competitors, Pennzoil’s claim of “better engine protection” was not puffery because it involves “more than a mere generality” and “left the consumer with the obvious conclusion that Pennzoil is superior to the other leading brands in protection against engine problems”); *Autodesk, Inc. v. Dassault Systemes Solidworks Corp.*, 685 F. Supp. 2d 1001, 1017-18 (N.D. Cal. 2009) (while subjective and not measurable in isolation, when viewed in context the statement that defendant’s computer program can “‘work easily’” with any version of software is not puffery).

1 Similarly misguided is P&G's overly simplistic argument that plaintiff alleges the color
 2 orange on the Fusion Power blade package is a false statement of material fact. Def's Mem. at
 3 10. As plaintiff alleges, the orange and blue coloring of the Fusion Power and Fusion manual
 4 products aids and supplements the deceptive message. ¶3. P&G's argument that the
 5 Complaint is like saying that Apple cannot charge more for identical iPods, one black and one
 6 white, underscores P&G's Fusion Power deception. Unlike the iPod hypothetical, plaintiff and
 7 reasonable consumers believed the Fusion Power and Fusion manual blades were different and
 8 not interchangeable. P&G's inference that this case is also about alleged beliefs that orange
 9 versus blue coloring affects the functionality of the blades is simply ridiculous. Def's Mem. at
 10 10. Likewise, plaintiff does not allege that because Fusion Power blades are more expensive
 11 than Fusion manual blades this constitutes a false statement of fact. *Id.* at 10-11. Like the
 12 Power moniker and orange coloring on the Power blades, the fact that the Fusion Power blades
 13 are more expensive than the blue manual blades aids and supplements the deceptive message.¹³

14 P&G also asserts that there are no actionable implicit representations or omissions.
 15 Def's Mem. at 11-15. In so arguing, P&G rehashes its mischaracterizations of the allegations
 16 stating, for example, "Plaintiff's subjective belief cannot form the basis for a claim because
 17 there are no representations" that "he was obligated to use the Fusion Power cartridges with
 18 his handle." *Id.* at 11-12. Notwithstanding the ruminations of P&G's lawyers about what
 19 reasonable consumers can and cannot believe, the allegations are that P&G's representations
 20 lead consumers to believe that "the more expensive Fusion Power razor handles should be
 21 paired with the more expensive Fusion Power cartridges, and Fusion manual and Fusion
 22 Power blades cartridges are different from each other in ways that are meaningful to the user."
 23 ¶¶1, 13, 15. Implicit representations, like those alleged in the Complaint are actionable
 24 misrepresentations. *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.

25
 26 ¹³ P&G's case citations are to factually inapplicable situations: *Thrifty Oil Co. v. Linder*,
 27 91 Cal. App. 4th 1070, 1073 (2001) (the Thrifty stations had at least one four-foot by six-foot
 28 sign identifying the cash and credit card prices for gasoline) and *Cardinal Industries, Inc. v. Pressman Toy Corp.*, No. 96-4590, 1996 U.S. Dist. LEXIS 18714, at *24-25 (S.D.N.Y. Dec. 16, 1996) (in a Clayton Act price-discrimination action the court noted that "Plaintiff has nowhere alleged that defendant made a false or misleading statement.").

3d 197, 205 (1983). P&G states that *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398 (E.D.N.Y. 2010) supports its argument that plaintiff cannot pursue an implicit message where explicit statements are to the contrary. Def's Mem. at 12. *Waldman* merely holds that "Plaintiff pleads nothing to suggest that she, or other class members, cared" about the alleged misrepresentations. 714 F. Supp. 2d at 403. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45 (2007), which holds that the implicit representation that Pentium 4 is better than Pentium III was puffery because "plaintiffs' theory requires vague suggestions upon vague suggestion," is also easily distinguished. Def's Mem. at 13. Contrary to the messaging at issue here, the only statement at issue in *Barbara's Sales* was the name "Pentium 4." 227 Ill. 2d at 74. As discussed above, the alleged deceptive message is governed by *Williams* and others that conclude an advertisement must be viewed as a whole.

Lastly, P&G argues that because it had no "fiduciary or confidential relationship" with plaintiff, P&G had no duty to disclose. P&G contends without a duty to disclose, there is no actionable omission under the CLRA. Def's Mem. at 15. This is not what the CLRA requires. Rather, plaintiff need only demonstrate P&G possessed material facts not known to plaintiff, and concealed the facts, or made partial representations, but also suppressed some material facts. *Daugherty v. American Honda Motor Corp., Inc.*, 114 Cal. App. 4th 824, 834-35 (2006). Materiality exists if the omitted information would cause a reasonable consumer to behave differently if he or she were aware of the information. *Tobacco II*, 46 Cal. 4th at 327 ("A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question....'"); see also *Mass. Mut. Life Ins.*, 97 Cal. App. 4th at 1294 ("A misrepresentation is material if it induced the plaintiff to alter his position to his detriment."). *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1274 (2006), cited by P&G, does not hold otherwise. There, the court found that DaimlerChrysler was not liable for failure to disclose information about the allegedly inferior exhaust manifolds because it did not make any representations about the exhaust manifolds. *Id.*; *Baba v. Hewlett-Packard Co.*, No. C 09-

05946, 2010 U.S. Dist. LEXIS 59747, at *21 (N.D. Cal. June 16, 2010) (same); *Wilkins v. Nat'l Broad. Co., Inc.*, 71 Cal. App. 4th 1066, 1082 (1999) (fraud claims).

By contrast, here, P&G represented on its packaging and advertisements that the Fusion Power razor blades were required for the Fusion Power handle. ¶¶10, 12. P&G however, failed to disclose the material fact that the cheaper Fusion manual blades also worked with the Fusion Power handle. ¶¶12, 13, 15. That is, nowhere (not even fine-print back-of-package disclaimers) on the Fusion Power blades or Fusion Power handles does P&G disclose that the cheaper Fusion manual blades can be used with the Fusion Power handles. A reasonable consumer would behave differently if armed with this knowledge, and thus, P&G was required to disclose this fact.

VII. Plaintiff States a Claim for Violation of Each Prong of the UCL

“[T]he primary purpose of the unfair competition law ... is to protect the public from unscrupulous business practices.” *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 975 (1992); *Tobacco II*, 46 Cal. 4th at 312. The UCL imposes strict liability on anyone who violates its prohibitions and the “scope of the UCL is quite broad.” *McKell*, 142 Cal. App. 4th at 1471; *see also Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 181 (2000) (“[P]laintiff need not show that a UCL defendant intended to injure anyone through its unfair or unlawful conduct.”). Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria (“unlawful,” “unfair” or “fraudulent”) to violate the UCL. *McKell*, 142 Cal. App. 4th at 1471.

A. Unlawful Business Practices

The UCL’s unlawful prong is essentially an incorporate-by-reference provision. “By proscribing ‘any unlawful’ business practice, ‘section 17200 ‘borrows’ violations of other laws and treats them as unlawful practices’ that the unfair competition law makes independently actionable.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). “With respect to the unlawful prong, ‘[v]irtually any state, federal or local law can serve as the predicate for an action’ under section 17200.” *People ex rel. Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 515 (2002) (emphasis omitted).

1 First, P&G contends that plaintiff's predicate violations of California's fraud and deceit
 2 statutes fail because the CLRA claim does not lie, and there are no actionable
 3 misrepresentations for violations based upon Civil Code §§1572-73, 1709, and 1711. Def's
 4 Mem. at 17. P&G is wrong for the reasons stated in §IV above. Accordingly, plaintiff's
 5 predicate violations stand.

6 Second, P&G wrongly contends that "a violation of the 'common law'... cannot
 7 support the 'unlawful' prong of the UCL." Def's Mem. at 17.¹⁴ In *Korea Supply Co. v.*
 8 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (2003), the Supreme Court unequivocally
 9 affirmed that common law violations are "unlawful" predicate acts for the UCL: "We
 10 conclude, therefore, that an act is independently wrongful if it is unlawful, that is, if it is
 11 proscribed by some constitutional, statutory, regulatory, *common law*, or other determinable
 12 legal standard." Similarly, courts of appeal have found that systematic breach of consumer
 13 contracts violate the UCL. *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1483
 14 (2005); *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1104 (1996).
 15 See also *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2007) (breach
 16 of contract may form the predicate for a UCL claim if the breach is unlawful, unfair or
 17 fraudulent). Here, P&G's systematic breach of its warranties is a predicate violation for
 18 purposes of the UCL's unlawful prong.¹⁵

19 **B. Fraudulent Business Practice**

20 To prove that a practice is "fraudulent" within the meaning of the UCL, one need not
 21 prove the elements of the common law tort of fraud. *Tobacco II*, 46 Cal. 4th at 312. "Instead,
 22 one need only show that 'members of the public are likely to be deceived.'" *Id.* A business

23
 24 ¹⁴ Its sole authority is an unpublished district court opinion, *Hartless v. Clorox Co.*, No.
 25 06cv2705, 2007 U.S. Dist. LEXIS 81686, at 11 (S.D. Cal. Nov. 2, 2007). *Hartless* cannot be
 26 followed in the face of published California Supreme Court and Court of Appeal decisions
 27 holding that a violation of common law may be a predicate act for the UCL's unlawful prong.
 28 *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) (federal courts deciding a case
 involving state law must follow the interpretation given by that state's court); *Sarausad v.*
Porter, 503 F.3d 822, 824 (9th Cir. 2007).

¹⁵ P&G does not address plaintiff's well-pled predicate violations under Bus. & Prof.
 Code §§17200 and 17500. Both laws are proper predicate violations.

1 practice is likely to deceive where “it is probable that a significant portion of the general
 2 consuming public or of targeted consumers, acting reasonably in the circumstances, could be
 3 misled.” *Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). The
 4 determination of whether a practice is likely to deceive is a “question of fact, requiring
 5 consideration and weighing of the evidence from both sides before it can be resolved.”
 6 *McKell*, 142 Cal. App. 4th at 1472.

7 P&G makes two challenges to plaintiff’s fraudulent prong claim. First, P&G repeats
 8 its contention that there are no actionable misrepresentations, and on that false premise argues
 9 no fraudulent prong claim can lie. Plaintiff properly alleges that members of the public are
 10 likely to be misled by P&G’s false and deceptive advertising that Power Fusion blades must be
 11 used with Fusion Power handles, and that Fusion Power blades are superior to Fusion manual
 12 blades. Like in *Williams*, this case is not the rare one where a court can determine that
 13 consumers are not likely to be deceived by the misrepresentations and omissions. 552 F.3d at
 14 939. Even if the fine-print, vague and ambiguous statement on the back of Fusion Power
 15 blade packaging could be considered clarifying information, the Ninth Circuit has rejected this
 16 disclaimer-type argument. *Id.*; *Rubio*, 613 F.3d at 1204-05.

17 P&G’s second fraudulent prong argument, that the allegations do not satisfy Rule 9(b),
 18 also confuses the Rule 8(a) standard applied to UCL’s fraudulent prong, with common law
 19 fraud’s Rule 9(b) standard. In any event, as discussed above, the allegations satisfy Rule 9(b).

20 **C. Unfair Business Practices**

21 Highlighting the absurdity of P&G’s self-serving mischaracterizations, P&G argues the
 22 Complaint does not state a claim under the UCL’s unfair prong because “Plaintiff has not pled
 23 the existence of a public policy to which Plaintiff’s vague claims of disappointment and
 24 confusion may be tethered. There is no constitutional, legislative, or regulatory provision
 25 concerning the coloring or naming of razor blade cartridges that Defendant has violated.”
 26 Def’s Mem. at 19-20 and n.9 (“Using a packaging design that allegedly does not meet
 27 plaintiff’s subjective expectations does not violate public policy.”). P&G gets the facts and
 28 law wrong, and its argument must be rejected.

1 “A business practice is unfair within the meaning of the UCL if it violates established
2 public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to
3 consumers which outweighs its benefits.” *McKell*, 142 Cal. App. 4th at 1473. The unfair
4 prong is “‘intentionally broad, thus allowing courts maximum discretion to prohibit new
5 schemes to defraud.’” *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1166 (2000). As the
6 California Supreme Court emphasized: “‘In permitting the restraining of all “unfair” business
7 practices,’” the UCL “‘undeniably establishes only a wide standard to guide courts of
8 equity [G]iven the creative nature of the scheming mind, the Legislature evidently
9 concluded that a less inclusive standard would not be adequate.’” *Cel-Tech*, 20 Cal. 4th at
10 181. P&G correctly notes that courts apply two different tests to determine whether conduct
11 violates the unfair prong. Def’s Mem. at n.9; *see also McKell*, 142 Cal. App. 4th at 1473.

12 P&G argues an unfair claim does not lie because “[p]ut simply, the use of a particular
13 coloring scheme and product name does not itself violate any law, standard or norm” and “a
14 packaging design that allegedly does not meet plaintiff’s subjective expectations does not
15 violate public policy.” Def’s Mem. at n.9. P&G’s argument is the one that is too simply put.
16 As discussed herein and in the Complaint, P&G’s advertising is false and deceptive and
17 violates specified laws. *See, e.g.*, ¶30. California has a strong public policy prohibiting false
18 advertising, and false advertising is never justified. *Vasquez*, 4 Cal. 3d at 808.

19 **VIII. Plaintiff States a Claim for Breach of Express Warranty**

20 An express warranty is created when a seller makes an affirmation of fact or promise
21 about the goods, or provides a description of the goods, which is part of the basis of the
22 bargain. Cal. U. Com. Code §2313(1)(a) and (b); *Weinstat v. Dentsply Int’l, Inc.*, 180 Cal.
23 App. 4th 1213, 1227 (2010). The statements or description creating the warranty may appear
24 in any variety of forms, including in advertisements or brochures. *Id.* at 1225-1233 (warranty
25 created by statements in product directions); *Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal.
26 App. 3d 951, 957 (1984) (warranty can be created by statements in sales brochure, in labels or
27 advertising). “The ‘whole purpose’ of warranty law is ‘to determine what it is that the seller
28 has in essence agreed to sell’” *Weinstat*, 180 Cal. App. 4th at 1228 (citing Cal. U. Com.

Code, §2313). The claim focuses on “*the seller’s* behavior and obligation – his or her affirmations, promises, and descriptions of the good – all of which help define what the seller ‘in essence’ agreed to sell.” *Id.* (emphasis in original).

P&G demonstrates its misunderstanding of an express warranty cause of action by repeatedly asserting that the claim must fail because plaintiff “has not proffered facts showing that he relied on any such affirmations or promises.” Def’s Mem. at 23. Reliance is not an element of a warranty claim. “[B]reach of express warranty arises in the context of contract formation in which reliance plays no role.” *Weinstat*, 180 Cal. App. 4th at 1230 (plaintiff did not receive product warranties until *after* the product was purchased and delivered. Nonetheless, “[t]he precise time when the words of description or affirmation are made ... is not material. The sole question is whether the language ... [is] fairly to be regarded as part of the contract.”). Regardless, in this case, plaintiff read the affirmations and statements on the product label and purchased the product in reliance thereon.

P&G’s remaining arguments are equally misplaced. It contends that “Plaintiff does not allege the terms of the warranty.” Def’s Mem. at 23. Of course he does. The label and advertisements containing the warranties are reproduced in, and attached to, the Complaint. On this very same issue the court in *Morey* wrote: “Contrary to NextFoods’ assertion, the complaint amply details NextFood’s warranties regarding GoodBelly products The complaint contains pictures of GoodBelly products that clearly state that GoodBelly ‘Supports Healthy Digestion [and] Natural Immunity’ and that GoodBelly has ‘Clinically Tested Live Cultures.’” *Morey*, 2010 U.S. Dist. LEXIS 67990 at *6.

Finally, P&G repeats its argument that plaintiff was not damaged because the Fusion Power blades worked and he otherwise received the benefit of his bargain. Def’s Mem. at 23. Plaintiff’s allegations (which must be taken as true) are that Fusion Power blades and Fusion manual blades are materially identical and interchangeable, and therefore plaintiff paid for a product that was not as advertised. ¶¶1, 3, 13-18, 53-54.

1 **IX. Conclusion**

2 For the foregoing reasons, P&G's Motion should be denied in its entirety. If, however,
3 the Court dismisses any portion of the Complaint, plaintiff requests leave to amend. *Eminence*
4 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (the policy in favor of
5 permitting amendment is to be applied with "extreme liberality.").

6 Respectfully submitted,

7 Dated: March 3, 2011

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on March 3, 2011, I electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF system which will send notification of such filing to the
4 e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have
5 mailed the foregoing document or paper via the United States Postal Service to the non-
6 CM/ECF participants indicated on the Electronic Mail Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that
8 the foregoing is true and correct. Executed on March 3, 2011.

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